No. 89-680

In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, UTAH, VERMONT, VIRGINIA AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

MARY SUE TERRY
Attorney General of the Commonwealth of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL*
Deputy Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

*Counsel of Record for Amici Curiae

Of Counsel:

PETER W. LOW, Esquire
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia 22901

(Continued on inside cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Don Siegelman
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130

Robert K. Corbin
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

Steve Clark
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201

Duane Woodard
Attorney General of Colorado
1525 Sherman Street
Second Floor
Denver, Colorado 80203

Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Thomas J. Miller
Attorney General of Iowa
Hoover State Office Building
2nd Floor
Des Moines, Iowa 50319

William J. Guste, Jr.
Attorney General of
Louisiana
234 Loyola Building
Post Office Box 94005
New Orleans, Louisiana
70804-9005

James E. Tierney
Attorney General of
Maine
Statehood Station 6
Augusta, Maine 04333

J. Joseph Curran, Jr.
Attorney General of
Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

Hubert H. Humphrey, III
Attorney General of
Minnesota
525 Park Street, Suite 200
St. Paul, Minnesota 55103

Robert J. Del Tufo
Attorney General of
New Jersey
Richard J. Hughes Justice
Complex CN112
Trenton, New Jersey 08626

Robert Abrams
Attorney General of
New York
The Capitol
Albany, New York 12224

Paul Van Dam
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84118

Jeffrey L. Amestoy
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Don Hanaway
Attorney General of
Wisconsin
114 East, State Capitol
P.O. Box 7857
Madison, Wisconsin
53707-7857

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INTEREST OF AMICI CURIAE

This brief in support of Georgia is submitted on behalf of Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont, Virginia and Wisconsin pursuant to Supreme Court Rule 37.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court held that Hawaii's tax treatment of alcoholic beverages violated the Commerce Clause of the United States Constitution. In response to *Bacchus*, the Georgia legislature amended its tax statute to conform to the ruling in *Bacchus*. That amended legislation has been upheld as constitutional. *Heublein, Inc. v. State*, 256 Ga. 578, 351, S.E.2d 190, *appeal dismissed*, 107 S.Ct. 3253 (1987). The Petitioner in this case seeks the refund of taxes voluntarily paid under the prior statute in effect at the time the Supreme Court decided *Bacchus*.

Amici States and other States are not infrequently faced with litigation which challenges state taxes on Commerce Clause and other constitutional grounds. A single United States Supreme Court decision declaring a state tax unconstitutional, if applied retroactively to taxes collected in other States, could impose an unanticipated liability on such States totaling billions of dollars. *See* W. Hellerstein, *Preliminary Reflections on McKesson and America Trucking Associations*, 48 Tax Notes No. 3, 325, 336 (July 16, 1990). Indeed, the effect of this Court's recent decision in *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (1989), relating to the taxation of federal, state and local retirement benefits, was not only to question the validity of the income tax structure in at least twenty-three States

but also to raise the issue of under what circumstances these States must refund taxes previously paid in an amount now exceeding $2.2 billion. While *Davis* was decided under the intergovernmental tax immunity doctrine rather than the Commerce Clause, there is a potential that these twenty-three States could be substantially affected by the Court's decision in this case.

For the above reasons, Amici States have a direct and abiding interest in the refund issue now before this Court.

SUMMARY OF ARGUMENT

This case concerns a class of tax cases where (a) the state statute in question has been in force for a long time (here more than forty years) and has been unchallenged throughout that period (here specifically upheld against constitutional attack the year after its passage); (b) state taxing authorities and fiscal planners, relying on their reasonable understanding of existing law and long tradition, budgeted, collected and/or spent tax moneys imposed under this statute; (c) this Court, in a recent decision, holds an analogous statute in another State unconstitutional; and (d) taxpayers file suits for refunds involving, in the aggregate, billions of dollars, claiming a right to reimbursement of taxes imposed at a time when both the taxpayer and the State reasonably believed the tax to be lawful. It is the position of the Amici in this Brief that in circumstances such as these this Court should measure the remedial obligations of the States by

a standard that takes account of the financial stability and reasonable reliance interests of state government.

There are two quite independent ways in which such a standard can be implemented. One is to follow the plurality approach in *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990) (*ATA*), and hold that new and unforeseeable decisions declaring state taxes unconstitutional ought not to be retroactively applied to closed transactions. The other is to read the remedial obligations of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), to permit as a matter of procedural due process, the consideration of reasonable state reliance interests and the necessity of sound fiscal planning as among the legitimate factors determining the availability of retrospective relief. In either event, it is submitted, States should not be required to divert current funds from the state treasury to compensate taxpayers for taxable transactions that occurred during a period when a holding of unconstitutionality by the court could not reasonably have been predicted based on the then-current law and settled understandings.

ARGUMENT

I. The Standards Governing State Refund Liability for Taxes Held Unconstitutional Should Take into Account the Financial Stability and Justifiable Reliance Interests of State Governments

At the outset it should be noted that, contrary to the frequent assertions of Petitioner in its Brief, this Court's decision last Term in *McKesson* is of only marginal relevance to the issues now before the Court in the present

case. *McKesson* concerned the remedial obligations imposed on state government in cases where it was entirely foreseeable at the time of enactment of the state tax statute that the tax in question would be contested and invalidated.

Here, by contrast, the issue is closer to the question presented in *ATA*, the companion case to *McKesson*. This Court held in *Bacchus* that a Hawaii state statute on alcoholic beverages was unconstitutional. In the decision below in this case, the Georgia Supreme Court held an analogous Georgia tax unconstitutional but also held that, since the tax had been imposed *before* the decision in *Bacchus*, the taxpayer was not entitled to a refund. The ground of decision in the Georgia Supreme Court was precisely the ground on which the *ATA* decision turned: application of a three-factor test to decide whether a constitutional decision is to be retroactively applied to taxes imposed *before* the decision was made.

The question here, therefore, concerns the standards by which constitutional decisions are to be applied to taxable events that are concluded before the constitutional decision is made. There is a second dimension of the question as well. In *ATA*, a tax statute enacted in 1983 was challenged in 1983; the taxpayer took the first available opportunity to challenge the tax in question.[1] In

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[1] *See also Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (tax assessments of Indian lands nontaxable by Congressional Act invalidated and refunds granted; suits were brought immediately upon the locality's adopting the practice of assessing such lands); *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912) (franchise tax on railroad company invalidated and refunds granted where tax imposed on conduct wholly outside the taxing State; the tax statute enacted in 1907 was challenged almost immediately).

McKesson also it was entirely foreseeable to the taxing and state fiscal planning authorities at the time of collection, indeed at the time of enactment of the statute, that a dispute would arise over the legality of the tax at issue. Here, by contrast, the taxes at issue were paid without complaint for the years in question (1982, 1983, 1984) and, by this taxpayer and others, for more than forty previous years. The taxpayer's complaint, in the form of a suit for a refund, was not filed until *after* this Court declared an analogous tax in another State unconstitutional.

It is unquestionably a major function of this Court to ensure that its decisions are adhered to by state courts and legislatures. There are also important values to be served, however, in accommodations by the Court that take into account the fiscal stability of state government. Here, for example, Georgia has collected a tax under a tax system enacted in 1938. The law was upheld against constitutional attack within a year by the Georgia Supreme Court. It is not a realistic option, as California points out in its Amicus Brief, that tax collection authorities will always accurately guess how existing state tax legislation will fare under subtly evolving constitutional standards, nor is it realistic to expect that state legislators and fiscal planners will anticipate the possible unconstitutionality of every unchallenged tax statute that has been on the books for many years. It is not surprising, therefore, that no one in Georgia government questioned the validity of the taxes paid by this Petitioner, nor is it surprising, indeed, that the Petitioner itself did not question the taxes when paid. No one had done so in over forty years. And it is entirely reasonable for Georgia to

have expended the moneys collected under this tax statute in 1982 and 1983 and 1984 in the normal operation of legitimate state governmental functions.

Now, however, Petitioner asks that Georgia be forced to carve out of current revenues a sum that will compensate it for taxes paid at a time when both parties – Petitioner and the State – assumed they were valid. From the perspective of state government, there should be no mistake about the stakes involved in upsetting such expectations and about the practical impact of unforeseeable monetary liability imposed directly on state treasuries. The potential monetary effect of this Court's recent decision in *Davis v. Michigan Department of Treasury, supra,* provides an example. In an attempt to measure the scope of the potential impact, the Virginia Office of the Attorney General conducted a telephone survey in September of 1989 of twenty-three States with statutes similar to the statute struck down in *Davis*. The States involved provided the following estimates of the potential fiscal impact of *Davis*, as of September 1989:

State	Potential Refund Liability Under State Statute of Limitations Period
Alabama	$10.2 million
Arizona	$261 million
Arkansas	$28 million
Colorado	$22.2 million
Georgia	$200 to $250 million
Iowa	$30 to $50 million
Kansas	$50 million
Kentucky	$50 million
Louisiana	$21 million
Michigan	$25 million
Mississippi	$30 to $35 million
Missouri	$152 million
Montana	$15 million
New Mexico	$25 million
New York	$35 million
North Carolina	$140 million
Oklahoma	$87 million
Oregon	$150 to $190 million
South Carolina	$200 million
Utah	$80 to $100 million
Virginia	$370.4 million
West Virginia	$27 million
Wisconsin	$103 million
TOTAL:	$2.1 to $2.25 billion

Raising taxes, as a theoretical matter, is an alternative answer to a revenue shortfall caused by an unanticipated constitutional tax decision by this Court. But the choice between raising taxes and cutting services is not subject to judicial control and, in today's economic and political climate, is very likely to be made in favor of cutting services. Either way, cases such as the one now before this Court will have a major fiscal effect in the States. This

Court, in effect, will become a major factor in the allocation of limited state resources. Taxes imposed (without objection) and revenues budgeted or spent (in good faith and without any reasonable expectation that they would have to be returned) may now have to be diverted from current state budgets. In this context, this Court's decisions will effect transfers of public funds, running into the billions of dollars. And the practical results of such redistributions will be felt primarily by the taxpayers and citizens who are the beneficiaries of state services. The impact on local government and on citizens dependent on critical state-supported services such as the public schools and higher education, housing, health and public safety, will be real and substantial.

Against this background, we submit, it is appropriate for this Court to measure the retroactivity of its state tax decisions by a standard that gives due recognition to the reasonable behavior of state government. And it is entirely reasonable in this context for a State to rely on systems of taxation that have been in place without challenge for as long as thirty or forty years. It is, of course, a major responsibility of this Court to assure that its interpretations of federal law are respected by state government, and to ensure that adequate remedies are available for the enforcement of the rights that find their source in federal law. But it is not necessary in the discharge of that function for massive financial liability to be imposed directly on state treasuries in a context where no reasonable notice of the possibility of such liability can fairly be said to exist. Nor is it unfair to withhold refund remedies from individual taxpayers in context such as these, where taxes have been imposed under a statute unchallenged

for years and where objections have been raised only in response to opportunities created by recent decisions of this Court.

Appropriate reliance interests and the settled expectations of state government can be protected by application of the equitable principles underlying *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Under this approach, it is important, however, for the standard of retroactivity to take into account reasonable reliance on settled understandings by state government. In another context, this Court has found it reasonable for state judges to rely on "reasonable, good-faith interpretations of existing precedents . . . even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990). We think it equally reasonable for state legislatures and fiscal planning authorities to rely on settled understandings of permissible tax structures "even though they are shown to be contrary to later decisions." And we also think it is reasonable that the cost of a good-faith mistake should not be massive financial liability imposed directly on the state treasury.

There are, of course, at least two quite different ways in which the legitimate reliance interests of state governments can be recognized. One, illustrated by the plurality approach in *ATA*, is to determine when decisions of this Court are to be applied retroactively – to decide as a matter of federal law that there is no state obligation to provide refunds or other retrospective remedial relief in cases where unforeseeable change is made in reasonable understandings about the applicable federal constitutional

standards.[2] The other, illustrated by the approach of the dissenters in *ATA*, is to permit the States to take account of legitimate reliance interests in the formulation of remedies for unconstitutional taxation – to decide that no refund remedy need be afforded under state law in situations where the State has managed its fiscal affairs in reasonable reliance on accepted understandings about the constitutional landscape.

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[2] In this case, the plurality view provides ample support for the conclusion that changes in the substantive law in appropriate circumstances are made by legislatures *and* courts. This has been recognized by a variety of distinguished jurists, including Justice Felix Frankfurter, *see Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring); Justice Benjamin N. Cardozo, *see Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932); Justice Oliver Wendell Holmes, *see Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); and Justice Roger Traynor of the California Supreme Court, *see Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 29 Hastings L.J. 533 (1977). Regardless of the source, legislative or judicial, there is a need for principles intended to avoid the harsh consequences of the retroactive application of newly made law. In the legislative sphere, our Constitution has codified historical and specific prohibitions such as the ex post facto and impairment of contract clauses to avoid the hardship that retroactivity would entail. In the judicial sphere, the safeguard is inherent in the *assumption* that a court is applying *pre-existing* rules or norms to a defined set of facts or circumstances. Where a court articulates *new* rules or norms, however, that assumption fails, and the duty rests with the court to consider the impact of retroactive application of its new decision on the prior conduct of the parties. Where, as here, the new rule *creates* disputes between parties where none existed before, the court has a duty to provide for an orderly transition from the old rule to the new. *Chevron Oil*, appropriately applied, fulfills that duty.

From the perspective of managing the practical affairs of state government, it matters little which of these approaches is taken. The important point, which it is the purpose of this Amici Brief to urge upon the Court, is that a state's reliance on the long-accepted status quo in matters of state taxation – manifested here by a statute unobjected to by taxpayers for over forty years – ought to be taken into account in determining the state's remedial obligations. Whatever one's theory about whether it is appropriate for newly announced constitutional decisions to be subject to a "retroactivity" analysis, the fact is that in the practical affairs of state government taxation, fiscal planning is conducted on the basis of assumptions about the state of the law and those assumptions have been changed in recent years by decisions that have declared unconstitutional tax statutes that have been in effect and enforced without objections since the 1930s and 1940s.

For States to be constitutionally obligated to go back in time, to repay millions (in some cases, billions) of dollars for fiscal years that are already closed is unnecessary and unwise. It is unnecessary because not required for the effective implementation of the constitutional decisions of this Court. It is unwise because it has the practical effect of involving this Court in allocative decisions involving the best uses of billions of dollars of state revenues. It is for these reasons that any theory about the constitutional obligations of state government in cases such as the one now before the Court should take into account the financial stability and justifiable reliance interests of state government.

II. This Court's Decision in *McKesson* Is Not Inconsistent with the Denial of Retrospective Relief in Some Contexts Predicated upon the State's Justifiable Reliance Interests and Need to Engage in Sound Fiscal Planning

Justice Scalia and the members of the Court who dissented in *ATA* embrace the position that all constitutional decisions apply fully to cases still open on direct review under applicable principles of state law. This view addresses but one of the three major issues that may arise in a case such as the one now before the Court.

The first of the three issues raised in the context now before the Court is whether a recent constitutional decision (here *Bacchus*) is to be applied to the facts in litigation. This issue translates into whether a federal right has been violated by collection of the tax in question. If *Bacchus* is not to be applied retroactively (as application of the *Chevron* principles to the situation before the Court would suggest), then the case is over – no federal right has been violated.

By contrast, if *Bacchus* is to be applied retroactively, a second issue arises. As recognized by the Court in *McKesson* and by both the plurality and the dissenters in *ATA*, it is first and foremost up to state law to determine the remedies that are available when the illegal assessment of a state tax is alleged. There are no federal questions here – state courts have the initial responsibility to determine the nature of the available relief.[3]

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[3] Except for the brief statement in footnote 2 of its opinion, the Georgia Supreme Court did not address below the remedial options open under state law should it be determined that

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The third issue, one that need not be reached in this case because the Georgia Supreme Court has not yet had occasion to decide the second question, concerns the scope of the federal due process obligation of state courts

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federal law mandates the retroactive application of *Bacchus*. Footnote 2 stated:

> We are not persuaded by Beam's argument that OCGA § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, "A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him. . . ." The statute does not describe how it should be determined that a tax was "illegally assessed." It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

James B. Beam Distilling Co. v. Georgia, 259 Ga. 363, ___ n.2, 382 S.E.2d 95, 96 n.2 (1989), *cert. granted*, 110 S.Ct. 2616 (1990).

As the plurality stated in *ATA*, 110 S.Ct. at 2330, "[t]he determination whether a constitutional decision of this court is retroactive . . . is a matter of federal law." The Supreme Court of Georgia in the case now under review applied the principles of *Chevron Oil* in deciding that *Bacchus* was not to be applied retroactively. Since no "plain statement" was made that principles of state law formed the basis for that decision, *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), this issue is now properly before the Court. Should the Court decide that *Bacchus* is to be applied retroactively in this context, the next question for decision, as indicated in the text, would be the scope of the available refund remedies under state law. Both *McKesson* and *ATA* make it clear that state courts are to be "entrusted with the initial duty of determining . . . relief." *ATA*, 110 S.Ct. at 2330. Hence, the appropriate disposition of this case if it is determined that *Bacchus* is to be applied retroactively would be a remand to the Georgia courts for further elaboration of the appropriate state remedies.

to provide more than a prospective remedy for taxes collected in violation of the Constitution. If the state courts deny retrospective relief under state law, in other words, the question is whether such denial accords with federal due process limitations. This issue was addressed by a unanimous Court in *McKesson*.

McKesson establishes that prospective relief alone is not adequate in a case where, on the facts, it was entirely foreseeable at the time of enactment of the state tax statute that the tax in question would be contested and invalidated. *McKesson* addressed the state interest in sound fiscal planning in the following passage:

> [W]e do not find this concern weighty *in these circumstances*. A State's freedom to impose various procedural requirements on actions for post-deprivation relief sufficiently meets this concern *with respect to future cases*. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitation applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability *in the future* to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

McKesson, 110 S.Ct. at 2254-55 (emphasis added). The Court observed that "in the present case, Florida's failure to avail itself of certain of these methods of self-protection weakens any 'equitable' justification for avoiding its constitutional obligations to provide relief" and added that in any event Florida had ample notice that the statute in litigation in *McKesson* was potentially defective when measured against constitutional standards. From this it followed that Florida's "'equitable' justification for avoiding its constitutional obligation to provide relief" was without basis.

It does not follow from this reasoning, however, that in *all* cases where state taxes have been found to violate federal law the "ability [of the State] to engage in sound fiscal planning," *McKesson*, 110 S.Ct. at 2254, is an illegitimate consideration. Florida's ability "in the future" to invoke procedural protections of the sort listed above suffices to secure its interest in sound fiscal planning because it was clearly on notice that the tax in question was of doubtful legality.[4] The same point could not in fairness be made in a

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[4] The Court was explicit about this rationale in *McKesson*, 110 S.Ct. at 2257, where it gave two reasons for the conclusion that "the State's interest in financial stability does not justify a refusal to provide relief." The first was that "the State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise, and even after the trial court found a Commerce Clause violation the State failed to take reasonable precautions to reduce its ultimate exposure for the unconstitutional tax." The second was that Florida could take procedural steps "in the future against any disruptive effects of a tax scheme's invalidation." The situation now before the Court is importantly different. The decision calling the Georgia tax statute into question *was* a surprise. And steps that Georgia – and other States now facing huge tax

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case where both the State and the taxpayer have had no reason to question the legality of a tax for thirty or forty years. In such a case, it is submitted, federal due process would not be violated by the restriction of relief to prospective invalidation of the tax.

There should be room in the applicable principles of federal due process, in other words, for consideration of the reliance interests of state government based upon reasonable assumptions about the stability of the law over time. This Court has been justifiably reluctant in other contexts, in particular those involving the Eleventh Amendment and liability for constitutional violations under 42 U.S.C. § 1983, to act as the creative agency for direct monetary liability against the state treasury. It has never suggested that *all* constitutional violations require full retrospective, compensatory monetary relief against state government. It would be ironic and unwarranted if taxpayer claims for the return of money paid without complaint and collected without suggestion of impropriety became an occasion for the direct imposition of monetary liability on the state treasury.

The plurality in *ATA* said that a state's "reliance interests may merit little concern" where it can "easily foresee the invalidation of its tax statutes." *ATA*, 110 S.Ct. at 2333. By contrast, the "potentially disruptive consequences for the State and its citizens" caused by a refund that "could deplete the state treasury, thus threatening the State's current operations and future plans," were regarded as among the valid

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refund claims – can take "in the future" are of little value to mitigate the disruption and financial instability now faced by many States based on events that have already occurred.

considerations counseling against retrospective recovery in cases where the State "cannot be expected to foresee" the invalidating decision. *Id.*

It is the purpose of this Amici Brief to urge that a realistic opportunity be afforded to the States to avoid the imposition of compensatory, retrospective money relief in contexts where it is unrealistic to expect fiscal planners to predict liability. This result should be achieved by a holding that unforeseeable constitutional decisions invalidating state taxes are not to be applied retroactively or, at the least, by a holding that reasonable limitations can be placed upon remedies. State government should not be required to divert literally billions of dollars from current budgets supported by the state treasury to compensate taxpayers who paid taxes that were proper under existing law and long tradition.

CONCLUSION

For the reasons stated, this Court should affirm the holding of the Georgia Supreme Court that the Petitioner is not entitled to the refund of taxes paid.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL*
Deputy Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

*Counsel of Record
for Amici Curiae